NO. 41912-2

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II

JEREMY JAMES BONO

Petitioner.

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

I, Jeremy James Bono, apply for relief from confinement. I am now in custody serving a sentence upon conviction of a crime.

1. The Court in which I was sentenced is Pierce County Superior Court.

2. I was convicted of the crime of Assault in the First Degree.

3. I was sentenced after trial on March 23, 2007 to serve 160 months. The Judge who imposed sentence was the Honorable Brian Tollefson.

4. My lawyer at Trial Court was Kent Underwood, 1111 Fawcett Avenue, Suite 101, Tacoma, Washington 98402.

5. I did appeal from the decision of the Trial Court. I appealed to Court of Appeals, Division II, Tacoma, Washington. The case number was 36131-1-II.

My lawyer on appeal was Sheri L. Arnold, P.O. Box 7718, Tacoma, Washington 98406.

The decision of the Appellate Court was not published.

6. Since my appeal, I have not asked the Court for relief from my sentence.

B. STATEMENT OF THE CASE

On October 12, 2005, Garret Wilson was living at the mobile home of Tracy Vasquez and they had known each other about one and one-half years. RP 163-164, 167-168. Tracy Vasquez had known the Defendant, Jeremy Bono, for a couple of years, although it was not a close friendship. RP 165-166. Vasquez had not met Defendant Metcalf prior to October 12, 2005 but had "seen him around". RP 166-167.

On October 12, 2005, Vasquez testified that he saw Defendant Bono drive by his home and then return about 20 minutes later when both Defendants came into his home. RP 169-170. Vasquez testified that Mr. Bono was just his "casual self" as he entered his home. RP 171. He also said that Defendant Metcalf seemed like he was intoxicated as he could smell it on his breath. RP 172. Metcalf then asked Vasquez who was Garret and Vasquez pointed Garret out as he was sitting next to him. RP 172. Vasquez then said that in a "normal tone" they said they needed to go for a ride and that Garret Wilson "willingly" got up and went with them. RP 173.

Garret Wilson testified that while doing tree work, presumably prior to October 12, 2005, he had fallen 40 feet from a tree and shattered his left heel, broke his tibia and fibula and fractured his right ankle. RP 314. And, further testimony by Vasquez about October 12, 2005 was as follows:

> "Q: Mr. Wilson did not object to leaving?
>
> A: No, he did not.
>
> Q: Was there a phone in your house, somebody had a cell phone or a land line?
>
> A: I'm sure cell phones.

Q: Did Mr. Wilson ask to use the cell phone?

A: Actually I think it was a house phone because the doctor called." (RP 239)

Garret Wilson testified that he was acquainted with Jeremy Bono for a year prior to October 12, 2005 because he was the brother of Wilson's former girlfriend. RP 317. Mr. Wilson testified that he did not have "any issues" with Jeremy Bono. RP 318. He further testified that Jeremy Bono had no problems with Wilson dating his sister. RP 318. The prosecutor brought into evidence through Wilson's testimony that Mr. Bono had threatened that if he slept with his sister he would kill him, however, Mr. Wilson stated twice that "it was just idle chit chat". RP 318-319. Garret Wilson said that when Mr. Bono and Metcalf came into Vasquez's house they asked him to "go for a ride". RP 320. He then left with the Defendants and got into Jeremy Bono's pick-up truck sitting between the two Defendants. RP 323.

Wilson testified that about two blocks away from Vasquez's home, the man in the passenger's seat put him in a sleeper hold, which made it hard for him to breathe. RP 324-326, 362-363. To that point, no one in the truck had spoken. RP 324. Metcalf then began hitting Wilson. Wilson described this as a "wrestling technique" and said that he relaxed and slowed his breathing down, although it was not difficult to breathe. RP 326. Wilson testified that when Metcalf started hitting him, he asked Jeremy Bono why he was getting beat up and Mr. Bono replied "something about half way through with his sister being arrested". RP 327-328. Wilson then explained that Jeremy Bono's sister had been arrested shop lifting at Walmart, although he was not with her at the time and he could not "think of any other explanation". RP 328. At this point in time, he was "just getting punched" by Metcalf and also was hit "a couple of times" with a "plastic R&R bottle" and that that "proved useless". RP 329. Wilson further testified that

Metcalf was using obscenities when he was hitting him and that they were "possibly" of a sexual nature. RP 331. Wilson testified that they drove to a logging road right off of the paved road and stopped at a gated logging road. RP 332. Wilson testified that his head was feeling "fine" when he exited the truck and that the fighting had pretty much stopped and he was asked to get naked, was told to run and he took off running. He then got hit with two rocks. RP 334. He did testify that when Metcalf attempted to hit him that he, Wilson, grabbed a hold of him and they both went toppling over to the ground. RP 335. Wilson testified that one rock hit him in the back of the head and one in his back and that the rocks did not hurt. RP 342. He said he never did see the rock and he does not know who threw them. RP 342.

He ran into the bushes and when he realized that the Defendants had left he went back to where he had left his clothes and put them on, discovering that his shoes had been taken. RP 344-346. He walked to the road and began walking towards Carbonado. RP 346-347. A man driving a truck picked him up and drove him to the fire station where Wilson called 911. RP 346-348.

Wilson testified that he defecated in his pants and he did this in the truck because he thought it would be "funny". RP 348. He waited approximately 20 minutes at the fire station when paramedics arrived and drove him to St. Joseph's hospital where he was treated for his injuries. RP 349-350.

At St. Joseph's Hospital, Garret Wilson was treated by Daniel Brocksmith, a physician's assistant. RP 276-277. Mr. Brocksmith testified that there was a CAT scan of Garret Wilson's face, which disclosed a nasal fracture and a basal fracture, together with lacerations to the head and face and a kind-of "puncture or laceration to the ear". RP 288. Mr. Brocksmith said that Garret Wilson never mentioned being assaulted with a rock. RP 301. He further testified that he

did not believe it was possible to beat someone to death with a plastic bottle, nor had he ever heard of anyone sustaining serious injuries that would lead to permanent damage as a result of being hit with a plastic bottle. RP 303. He further testified that he felt it would be "outrageous" for someone to contend that a person could be beaten to death with a plastic bottle. RP 303.

Garret Wilson testified that Jeremy Bono never struck him and never said anything to him. RP 336-337.

While P.A. Brocksmith testified there was basal skull fracture and a nasal fracture, he indicated that there was no treatment needed for either. There was no testimony elicited on the age of these fractures. He further testified there was no internal injury to the brain or any tissue. RP 290. P.A. Brocksmith testified that he did not anticipate any permanent or long term effects from these injuries. RP 292.

On October 26, 2005, the Pierce County Prosecutor filed informations charging Jeremy Bono and Jared Metcalf with one count, each, of Assault in the First Degree, and alleging a deadly weapon enhancement. The cases were consolidated for trial before the Honorable Brian Tollefson.

Both Defendants were found guilty as charged following a jury trial and Defendant Jeremy Bono was sentenced on March 23, 2007 to a 160 month confinement.

C. GROUNDS FOR RELIEF

I claim that I have eight Grounds for Relief from the conviction and sentence previously described. I should be given a new trial or released from confinement because improper instructions were given to the jury, and errors were committed in the introduction of evidence and through the action of the Prosecuting Attorney. My conviction was obtained in violation of the laws of the State of Washington and other grounds exist to challenge the legality of the restrain of

my person. Further, there are no other remedies available to address the wrongs that have been committed against me.

FIRST GROUND:

Petitioner, Jeremy James Bono, as his First Ground, petitions the Court to vacate his conviction and dismiss the criminal charges against him because the Trial Court improperly submitted an ambiguous jury instruction on accomplice liability, which relieved the State of its burden of proof on an element of the charged crimes.

The Court in its Instruction No. 7 instructed the jury as follows:

> "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) Solicits, commands, encourages or requests another person to commit the crime; or
> (2) Aids or agrees to aid another person in planning or committing the crime.
>
> The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice."

In State v. Cronin, 142 Wn. 2d 568, 14 P. 3d 752 (2000), the Supreme Court struck down an instruction almost identical to the instruction given in my case. This was a consolidated appeal involving the appeals of one Linh Ngoc Bui, who was charged with First Degree Assault and one Timothy Dennis Cronin, who was charged with Aggravated Murder in the First Degree

and First Degree Felony Murder. Upon holding that the instruction was defective and not harmless in State v. Bui, the Supreme Court reversed Bui's conviction of First Degree Assault and also reversed Cronin's conviction for Premeditated First Degree Murder for the same reason.

The instruction on accomplice liability found deficient in State v. Bui read as follows:

> "A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it promote or facilitate the commission of a crime, he or she either:
>
> (1) Solicits, commands, encourages or requests another person to commit the crime; or
> (2) Aids or agrees to aid another person in planning or committing a crime."

Facts of Bui Case:

Ling Ngoc Bui was a member of a gang known as the "Viet Boys". While riding in a vehicle in Seattle, a vehicle driven by Bui and containing several members of his gang blocked the passage of another vehicle containing rival gang members. Immediately after the vehicles stopped, members of the "Viet Boys" gang exited from Bui's car and fired shots from a firearm into the rival gang's car that was blocked. Another vehicle also containing members of this rival gang then approached and the passenger in Bui's car opened fire on it and struck several of the occupants with bullets.

Bui and the shooter were each charged with Assault in the First Degree with the allegation that they used "firearms and deadly weapons in the commission of the offense".

At the conclusion of the trial, the Trial Judge instructed the jury on accomplice liability as set forth above.

Legal Analysis of Supreme Court:

In striking down this instruction, Justice Gary Alexander reasoned that the accomplice liability instruction allowed the jury to find Bui guilty of a crime committed by another person without proving that Bui had general knowledge of the specific crime with which he was eventually charged and convicted. The Court stated that the specific issue on appeal was "whether a putative accomplice can be found guilty of the crime charged for merely acting with knowledge that his actions would promote or facilitate 'any crime'".

In reversing the conviction, the Court reasoned that the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. State v. Acosta, 101 Wn. 2d 612, 683 P. 2d 1069. And a conviction must be reversed if a jury was instructed in a manner that would relieve the State of this burden. State v. Jackson, 137 Wn. 2d 712, 976 P. 2d 1229 (1999). In Jackson, the Court noted that "the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden."

The Supreme Court then noted that the jury instruction on accomplice liability departed from the accomplice liability statute and essentially allowed the jury to convict Bui as an accomplice if it found that he knew his actions would promote or facilitate "a crime".

The Court further held that for one to be deemed an accomplice, he must have acted with knowledge that he was promoting or facilitating the crime for which he was eventually charged; namely, assault. The Court dismissed the State's contention that "accomplice liability attaches so long as the Defendant knows that he is aiding in the commission of any crime". The Court further said that "we adhere to our decision in Roberts [State v. Roberts, 142 Wn. 2d 471, 14 P.

3d 713 (2000)] and conclude here, as we did in that case, that the fact that a purported accomplice knows that the principal intends to commit 'a crime' does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal."

The instruction given in instant litigation read, in part:

> "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable...
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:..." (Instruction 7)

As with Bui, Jeremy Bono could have been found guilty as an accomplice for the commission of "a crime" meaning "any crime".

The Court also noted that, as found in Roberts "that the legislative history of RCW 9A.08.020 supports a conclusion that the legislature 'intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has knowledge". (Roberts, 14 P 3d 735 at 736)

Assault 2d = Assault 1st:

The additional infirmity of Instruction 7 as given in Mr. Bono's trial is that initially the Instruction advises the jury that "a person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable." Under this language, a person can be guilty of any crime if it is committed by a person for whom he is legally accountable. And then the Instruction goes on to say:

> "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either..."

And now we see that under this Instruction, Jeremy Bono could have been found to be an accomplice in the commission of, again, a crime and this crime could very well have been

Assault in the Second Degree. So long as the jury found Jeremy Bono to have been "an accomplice" they then could have transferred that accomplice status to the commission of Assault in the First Degree because of his accomplice status.

Instruction 7 also departs from the language of the statute in yet another material manner. RCW 9A.08.020 provides as follows:

> "A person is an accomplice of another person in the commission of a crime if:
>
> (a) with knowledge that it will promote or facilitate the commission of the crime, he
> (1) solicits, commands, encourages or requests such other person to commit it; or
> (2) aids or agrees to aid such other person in planning or committing it; ..."

And, Instruction 7, as given by the Court, read:

> "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.
> ..."

The instruction substitutes "another person" rather than "such other person". Obviously, "another person" could be anyone and not solely the principal actor for whom the Defendant is an alleged accomplice. In this trial, the jury might well have found that Jeremy Bono solicited the aid of Vasquez, the owner of the home in which Garret Wilson was found, to have Wilson in the

home when Metcalf was brought to the home. Rather than confining the solicitation of aid solely from Metcalf, as required by RCW 9A.08.020, the instruction permits accomplice complicity even if the jury finds that Bono solicited aid from Vasquez, or, for that matter, any other person, which would not be in keeping with the statute.

The confusion in Instruction 7 could, additionally, have been lessened if the second paragraph would have read as follows:

> "A person is an accomplice of such other person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:..."

Argument of Prosecuting Attorney:

The deficiencies and ambiguities in this instruction are alone sufficient to have brought about an erroneous result by the jury. However, this instruction, in combination with the flawed final argument of the Prosecuting Attorney, almost certainly brought about a wrong result and deprived Jeremy Bono of his Constitutional right to have the State prove every essential element of a crime beyond a reasonable doubt. In his final argument, the Prosecuting Attorney advised the jury:

> "But through the trial process, despite what a witness may say on the stand now, by virtue of past statements, by virtue of an overall understanding, using common sense, you get a clear picture of what happened. And what happened in this case is egregious and unconscionable.
>
> I want to point out a few instructions that are very important for you to understand in making your decision in this case. First thing I want to do, I guess, the instruction is number 15 (the 'to convict' instruction; author's note) that I want to go to first, but I want to say something regarding the elements in number 15. When I first spoke to the first juror in this case in jury selection I said, if you recall, how important would it be if chosen to be on this jury to render a verdict that represents the truth about what happened, and everybody agreed that's what you're here for.

> Well there's a little twist now that the case is over and the Courts instructed you. You do not have to decide the truth of everything that happened. That is not your job. Maybe some jurors feel like they have to decide beyond a reasonable doubt what really happened in the case, and that is not the law. The law is you have to determine, if you render a guilty verdict, the truth about the elements, the truth of the charge. Is the State's charge, is the State's contention that these two men committed an Assault in the First Degree true or not. That's the truth that you're here to decide." RP 537-538.

Telling the jury that, now that the trial is over, there's "a little twist" in their obligation to look for the truth and that they do not have to base their decision on the standard "beyond a reasonable doubt" was, of course, wrong and extremely prejudicial. Especially in a case where the victim, was asked how his head was feeling as he exited the truck and stated "I was still fine". And that "the fighting pretty much stopped". And, asked once they were out of the truck did any more fighting occur and stated "no". RP 334. And that Jeremy Bono did nothing "physical" to him, that "he just stood there" and that he did not "say anything to the person that was beating him". RP 337 (in other words, did not encourage him, or command him). And that when he was hit with the rocks that they did not "hurt" and that one of the rocks hit him "in the back where my ribs were previously cracked earlier that year". RP 342. Argument like that from the Prosecutor, telling the jury that they do not have to make a decision "beyond a reasonable doubt" in a case where there is such a paucity of evidence connecting Jeremy Bono to a crime in this series of events simply invites the jury to engage in speculation and to minimize the importance of its obligation to decide a case beyond a reasonable doubt.

Can anyone say, truthfully, that Jeremy Bono did anything other than drive, with Metcalf, to the house of Tracy Vasquez and after Garret Wilson willingly decided that he would go for a ride with the two of them, get back in his truck with Wilson and Metcalf and drive away from the Vasquez residence? After about two blocks of driving a fight then erupted between Wilson and

Metcalf. There is nothing to show that Jeremy Bono had any involvement with this fight and simply continued driving until Metcalf and Wilson decided that they wanted to stop the truck outside of Carbonado for a smoke, as the fighting had stopped, when the three of them exited the truck and Metcalf and Wilson again briefly resumed their fight and then Wilson, again at the direction of Metcalf, stripped off his clothing and ran into the woods. While it may not have been the most charitable thing to do for Jeremy Bono to drive away from this scene and one could say he certainly was not being his "brother's keeper", there would be nothing criminal with this action. And, when we also throw in the fact that the Prosecuting Attorney in final argument told the jury that Jeremy Bono did not assault Garret Wilson, there is significant evidence this jury verdict was a result of speculation. RP 589

SECOND GROUND:

Petitioner, Jeremy James Bono, as his Second Ground, petitions the Court to vacate his conviction and dismiss the criminal charges against him because the Trial Court improperly instructed the jury under the "to convict" instruction.

The Court in its Instruction No. 16 instructed the jury as follows:

> "To convict the Defendant Jeremy James Bono of the crime of Assault in the First Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about 12th day of October, 2005, the Defendant or an accomplice assaulted Garret Wilson;
> (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
> (3) That the Defendant or an accomplice acted with intent to inflict great bodily harm; and
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty."

The jury could have believed, and probably did believe, that Metcalf had both the mens rea and the actus reus and yet have convicted Jeremy Bono simply because he was an accomplice, even though he had not either the mens rea or the actus reus. The jury could have, and probably did, convict Jeremy Bono even though it did not find that he had either the requisite intent or that he acted with a deadly weapon or force or means likely to produce great bodily harm.

The decision in State v. Roberts, 142 Wn. 2d 471, 14 P. 3d 713 (2000), clearly shows the infirmities of Instruction 16 in that various actions, but most importantly, the requirement of action "with intent to inflict great bodily harm" could have been committed by an accomplice.

In State v. Roberts, the offending instruction, which reads almost verbatim Instruction 16 (except the crimes charged are different), read:

> "To convict the Defendant Michael Kelly Roberts of the crime of Premeditated Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 6th day of May, 1994, the Defendant or someone to whom he was an accomplice, stabbed Elijio V. Cantu;
> (2) That Elijio V. Cantu died as a result of this stabbing;
> (3) That the stabbing was done with the intent to cause the death of Elijio V. Cantu;
> (4) That the intent to cause the death was premeditated; and
> (5) That the acts occurred in the State of Washington."

In holding that this instruction was defective, the Court said:

> "The jury instructions herein allowed Roberts to be convicted of Premeditated Murder in the First Degree solely as an accomplice. Jury Instruction 8, the 'to convict' instruction informed the jury that the elements of the crime could be committed by Roberts 'or someone to whom he was an accomplice...' Therefore, the 'to convict' instruction did not require the jury to find that Roberts acted with premeditated intent, although a special interrogatory addressed this issue and was answered in the affirmative. The 'to convict' instruction also did not require any showing that Roberts personally caused the death of Cantu or actively participated in the events that lead to Cantu's death."

Similarly, Instruction 16 permitted the jury to convict Jeremy Bono of First Degree Assault solely as an accomplice and did not require the jury to find that Jeremy Bono acted "with intent to inflict great bodily harm". Further, Instruction 16 did not require any showing that Jeremy Bono personally participated in the assault with a deadly weapon or by force or means likely to produce great bodily harm or death.

Following its analysis of the "to convict" instruction in Roberts, the Supreme Court held that "we hold when jury instructions as used in this case allow for the possibility that the Defendant was convicted solely as an accomplice to Premeditated First Degree Murder, the

Defendant may not be executed unless the jury expressly finds (1) the Defendant was a major participant in the acts that caused the death of the victim and (2) the aggravating factors under the statute specifically apply to the Defendant. Since the jury here was not instructed in this manner, we hold this to be reversible error."

Another difficulty with Jeremy Bono receiving a fair trial, after the Prosecuting Attorney tells the jurors that "maybe some jurors feel like they have to decide beyond a reasonable doubt what really happened in this case, and that is not the law", is that this invites sloppy work on the part of the jurors, work that does not analyze and think through instructions, and read them over carefully, but invites them to "jump" at conclusions. In looking at Instruction 16 again, we see the following:

> "To convict the Defendant Jeremy James Bono of the crime of Assault in the First Degree as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) that on or about the 12th day of October 2005 the Defendant OR AN ACCOMPLICE assaulted Garret Wilson;
> (2) that the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
> (3) that the Defendant OR AN ACCOMPLICE acted with intent to inflict great bodily harm; and
> (4) that the acts occurred in the State of Washington."

If the jury would have concluded that Jared Metcalf had both the mens rea and the actus reus and was the principal in the commission of this crime and if they did not fully think through Instruction 16, as the Prosecutor's remarks would have encouraged them so to do, then they could have found that Jared Metcalf was an accomplice of Jeremy Bono and, pursuant to Instruction 16, have convicted Jeremy Bono. This would necessitate the jury finding that there was no principal involved in the commission of the crime but only accomplices. This is because we know that

Jeremy Bono did not have, certainly, the actus reus for the Prosecuting Attorney, in his final argument, advises the jury that Jeremy Bono did not assault Garret Wilson. RP 589

THIRD GROUND:

Petitioner, Jeremy James Bono, as his third ground, petitions the Court to vacate his conviction as the Trial Court submitted an issue to the jury upon which there was insufficient evidence to support. It is error to submit to the jury a theory for which there is insufficient evidence. State v. Amezola, 49 Wn. App. 78, 741 P. 2d 1024 (1987); State v. Munden, 81 Wn. App. 192, 913 P. 2d 421 (1996).

The Court in State v. Amezola, 49 Wn. App. 78, 741 P. 2d 1024 (1987), sets forth the well established principle that a Trial Court improperly places an issue before a jury if there is insufficient evidence to support that issue. The Court in Amezola held it was error to submit in the "to convict" instruction a theory of accomplice liability. In Amezola, one Judelia Morales-Ramirez lived in the same home with three males who were involved in the distribution and selling of cocaine. The evidence showed that Ramirez did all of the cooking for the household and would be present while the three males would cut and package the heroin into smaller packages. About $30,000.00 worth of heroin a week was being delivered to the home for them to deliver and sell. Ramirez was found guilty of possession of heroin with intent to deliver. There was no testimony that Ramirez took any part in delivering the heroin, although she obviously knew what the activities were of the three males living with her in this home. In reversing the conviction and holding that the Court erred in giving the "to convict" instruction, which allowed the jury to find Ramirez guilty on either the theory of constructive possession or accomplice liability, the Court said:

> "Although there may have been sufficient evidence to find Ramirez guilty under the constructive possession theory, we cannot determine whether the jury based its verdict on constructive possession or accomplice liability because Instruction 8, the 'to-convict' instruction allowed the jury to convict on either of these theories. Where, as here, the jury is presented with alternative

> means of committing a crime, jury unanimity is not required as long as there is substantial evidence of both alternatives. Since, as analyzed above, the evidence was insufficient to support the accomplice alternative, the error cannot be said to be harmless and the convictions must be reversed and the case remanded for re-trial on the State's constructive possession theory only."

The "to convict" instruction in Ramirez read, in relevant part, as follows:

> "To convict the Defendant Judelia Morales-Ramirez of the crime of Possession with Intent to Deliver a Controlled Substance, ... each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) that on or about the 21st day of December, 1984, the Defendant or her accomplice possessed with intent to deliver a controlled substance..."

Similarly, the "to convict" instruction in instant litigation read, in relevant part, as follows:

> "To convict the Defendant Jeremy James Bono of the crime of Assault in the First Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) that on or about the 12th day of October, 2005, the Defendant or an accomplice assaulted Garret Wilson;..."

This instruction permitted the jury to find Jeremy Bono guilty either as a principal or an accomplice. Yet, we know that there was no evidence to support conviction of Jeremy Bono as a principal because the Prosecuting Attorney, in his closing argument, so advised the jury. The Deputy Prosecutor said:

> "It's a case of manipulation. It's a case of Jeremy, <u>who did not commit any physical assault himself against this person</u>, but he took someone who nobody would know, who the victim wouldn't be able to say I know that person, I can identify that person, I know his name." (RP 589)

Even though there clearly was no evidence that Jeremy Bono could have acted as a principal, the jury was instructed in such a fashion that he could have been convicted under that theory of liability, in contravention of the holding in Amezola.

FOURTH GROUND:

Jeremy Bono, as his Fourth Ground, petitions the Court to vacate the 24 month deadly weapon enhancement. On March 23, 2007, Mr. Bono received a sentence of 136 months with a 24 month deadly weapon sentence enhancement. CP 131-143.

Under RCW 9.94A.310, a deadly weapon enhancement cannot be applied to a conviction of First Degree Assault.

Further, under the deadly weapon enhancement there is one definition, and that flows from the wording of the weapon, "deadly" weapon. It has to be a weapon that is capable of inflicting death. As the Washington Supreme Court said in State v. Thompson, 88 Wn. 2d 546, 564 P. 2d 323:

> "We think that Division One has read the statute correctly. It was evidently the Legislative intent that the statute should apply to all persons armed with a deadly weapon – that is, one capable of producing death – at the time of the commission of the offense."

And, it is not the extent of the wounds actually inflicted by the weapon but rather weather the weapon was capable of inflicting life-threatening injuries. This was clearly pointed out in State v. Cobb, 22 Wn. App. 221, 589 P. 2d 297:

> "The test is not the extent of the wounds actually inflicted. Rather, the test is whether the knife was capable of inflicting life-threatening injuries under the circumstances of its use."

And, again citing State v. Amezola, 49 Wn. App. 78, 741 P. 2d 1024, we know that a Trial Court improperly places an issue before a jury if there is insufficient evidence to support that issue.

Under the facts in this case, there could only have been two "weapons", a plastic liquor bottle or a rock. And the only witness with any expertise in this area, and, the only witness actually addressing this issue, Physician's Assistant Brocksmith testified as follows:

"Q: Do you think you could beat somebody to death with a plastic bottle?

A: I guess if you had – to define the thickness of the bottle maybe.

Q: Just a regular plastic bottle you might find at a liquor store.

A: No, sir, I don't think so.

....

Q: Have you ever heard in your medical training as somebody being beaten to death by a plastic bottle?

A: No, sir, I have not.

Q: How about serious injuries, ever hear of anybody sustaining serious injuries such that there would be permanent damage with a plastic bottle?

A: No, sir.

Q: Does it sound rather outrageous that somebody could be beaten to death with a plastic bottle?

A: Yes, sir, I guess so." RP 303

And, as to the rock, first we know that Garret Wilson said it did not hurt when it hit him.

RP 342

"Q: Okay, is it possible that you actually were in a scuffle and went to the ground and fell on a rock and hit your head?

A: That could have possibly been what I hit my head on, yes. But I do know a rock was thrown at me because I felt it in my <u>back</u>.

Q: Okay. A rock was thrown at you and hit you in the back, but it might also be the case that when you went to the ground with this other guy –

A: I could have hit my head on a rock, yes. That could have been it." RP 377-378

And, how is one "armed" with a deadly weapon if that weapon happens to be a rock along side of the road. In State v. Ross, 20 Wn. App. 448, 580 P. 2d 1110, the issues was whether a motor vehicle could be a deadly weapon. In addressing, first, the question of whether a motor vehicle could be a deadly weapon, the Court said:

> "Had the Legislature intended, it could have specifically included motor vehicles within the enhanced penalty statute. There is no question that an automobile may be a lethal weapon, but that does not mean it is a deadly weapon within the statue. When the enhanced penalty statute was enacted, motor vehicles were quite common, and were known to be lethal instruments, but the only weapons specifically mentioned in the statute are either handheld or explosive, or those containing poisonous or injurious gas. Applying the ejusdem generis doctrine, a motor vehicle certainly does not come within these categories. Penal statutes are construed strictly against the State and in favor of an accused. Accordingly we must conclude an automobile is not a deadly weapon within the meaning of RCW 9.95.040."

And in addressing the issue of being "armed", the Court said:

> "Procedural due process requires that citizens be given fair notice of conduct forbidden by a penal statute. Although impossible standards of specificity are not required, the statutory language must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.
>
> ....
>
> Thus, the ordinary understanding of being armed with a weapon must mean something more than driving a motor vehicle. The statute bespeaks instruments on the person which are designed to injure or kill."

Thus, we see that a rock, first, should not be considered a deadly weapon and, secondly, a rock alongside of the road would certainly not be considered as "arming" a person who happens to be standing alongside the road.

FIFTH GROUND:

Instruction No. 7 advised the jury:

> "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:..."

Instruction No. 7 includes "knowledge" as an element of the crime. Knowledge is defined in RCW 9A.08.010 as follows:

> "Knowledge
> A person knows or acts knowingly or with knowledge when:
> (1) He or she is aware of a fact, facts or circumstances or result described by a statute defining an offense; or
> (2) He or she has information which would lead a reasonable person in the same situation to believe that facts exist, which facts are described by a statute defining an offense."

While the holding in State v. Scott, 110 Wn. 2d 682, 757 P. 2d 492 (1988), would not necessarily require a reversal, the Court does say:

> "This is not to say, of course, that reason exists why trial courts should refuse requests that 'knowledge' be defined. For certain offenses – complicity being one – definitional instructions of 'knowledge' are recommended."

In instant litigation, because of the facts and the other instructional errors set forth herein, it is asserted that the cumulative effect of failing to define "knowledge" was another part of the failure to provide a fair trial to Jeremy Bono. Because, not only is there no testimony showing that Mr. Bono participated in this crime, there is an abundance of testimony reflecting that he never struck Garret Wilson, that he never encouraged Metcalf in Metcalf's actions against Garret Wilson and that it appears that he was, at most, only a driver of a vehicle in which a fight erupted

between his two passengers. An instruction on the definition of "knowledge" would have aided Mr. Bono in obtaining a fair trial.

SIXTH GROUND:

We know that Jeremy Bono did not assault Garret Wilson as the Prosecuting Attorney so advised the jury. RP 589; RP 336-337 And, we know that no adverse action was taken against Garret Wilson either in Vasquez's home or until a point some two blocks from Vasquez's home when Garret Wilson and Metcalf starting fighting. And, since Jeremy Bono did not assault Garret Wilson, do we really know that Jeremy Bono had any involvement with this altercation other than driving a vehicle in which these two individuals were fighting (admittedly, Metcalf got the best of Wilson). RP 390 We also know that when the truck was stopped on the logging road, Wilson "felt fine" and at the time they exited the truck, the fighting had stopped. RP 334 And, even though Metcalf and Wilson shortly thereafter resumed their altercation, and grappled and fell to the ground, again, Jeremy Bono took no part in any of this and did not give encouragement or assistance to Metcalf by word or deed. Jeremy Bono then drove the truck away from the logging road, after Wilson ran into the woods, with Metcalf as his passenger. However, these actions of driving the truck, while the two passengers were fighting and then, after the fight had ended and then resumed and driving away again would not constitute accomplice liability under the holding in State v. Robinson, 73 Wn. App. 851, 872 P. 2d 43.

In Robinson, Chima Robinson was driving a vehicle in which his friend Baker was seated opposite him in the passenger seat and three other friends were in the back seat. As they were going around Green Lake, slowly, Baker suddenly opened the door and jumped from the car and ran to a 14 year old girl (Reynolds) who was walking on the sidewalk opposite the car and took her purse. There was a brief struggle in order to obtain the purse and then Baker jumped back in the car and Robinson drove from the scene and shortly thereafter the purse was thrown from the window of the car and Robinson took Baker to a friend's home. As Baker got into the car,

Robinson saw the purse and he testified that he could not leave Baker there since he was a friend so he drove off quickly.

The Court found that Robinson knew that Baker had forcefully taken the girl's purse and drove off. The Court further found that Robinson, after taking Baker to a friend's house, did not return to check on the victim or make any attempt to return her property to her.

Robinson was charged with Robbery in the Second Degree on the theory of accomplice liability. In holding that such could not follow from that set of facts, the Court said:

> "Because Baker had completed the act of robbery by the time he re-entered the car and Robinson saw the purse, Robinson could not have aided and abetted Baker's crime. He neither associated himself with Baker's undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions of his own. His knowledge that Baker seemed to be struggling with Reynolds and his mere presence at the scene cannot amount to accomplice liability for Baker's crime. Likewise, Robinson's subsequent action of driving away with Baker could not have aided and abetted Baker to commit the Second Degree Robbery because by then, Baker had already completed that crime.
>
> Instead, Robinson's actions were more in the nature of rendering criminal assistance."

SEVENTH GROUND:

There were several errors occurring during trial which would have had a substantial impact upon the jury and, any one of which would have prevented Jeremy Bono from receiving a fair trial. And, certainly, the cumulative effect of all of these would have worked against Jeremy Bono's right to a fair trial. As the Court said in State v. Coe, 101 Wn. 2d 772, 684 P. 2d 668 (1984):

> "We reverse the convictions of Fredrick H. 'Kevin' Coe. The accumulated evidentiary errors committed by the Trial Court necessitate a new trial, as do the violations of our discovery rules by the Prosecuting Attorney. While it is possible that some of these errors, standing along, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial."

And, in State v. Alexander, 64 Wn. App. 147, 822 P. 2d 1250, the Court noted that even though certain of the trial errors were not properly preserved for appeal because the cumulative effect of all of these errors would have denied the Defendant a fair trial the Court reversed the conviction. As the Court said:

> "As a preliminary matter, we note that several of the errors alleged on appeal were not properly preserved for appeal. Because we believe, however, that the cumulative effect of all these errors, preserved and not preserved, denied Alexander a fair trial, we exercise our discretion under RAP 2.5(a)(3) to review all of his claims."

Severance of Trials:

From the beginning, Jeremy Bono's trial should have been severed from the trial of Jared Metcalf. There was testimony that the Sheriff had to use dogs to track Jared Metcalf and locate him up a tree in order to effect an arrest. RP 589.

There was testimony by Vasquez and Wilson that Jared Metcalf offered them money and property not to testify at trial. RP 148; RP 254-255. There was testimony that Garret Wilson

first met Metcalf on a chain gang in the Courthouse and that he recognized him from the photomontage that the detectives had shown him. RP 375. There was even testimony that Metcalf called Vasquez over 100 times from the jail. RP 186.

Witness Pressured by Prosecuting Attorney:

Tracy Vasquez testified that he felt pressure to testify as the Prosecutor wanted him to or he would be placed in jail.

> "Examination by Greer:
>
> Q: The pressure from me in what respect?
>
> A: Because, let's see, I've been threatened in the past by the Prosecutor's office that if I do not testify to something I do not have knowledge to I will go to jail.
>
> Q: Which Prosecutor ever threatened you?
>
> A: Your Victim's Advocate. (RP 257)
>
> ---
>
> Q: Okay. Is that affecting your testimony here today?
>
> A: Today?
>
> Q: Or yesterday?
>
> A: Well he keeps on using the word – what's the word – perjury. I feel like he's going to put me back in jail.
>
> Q: So you feel threatened to say what he wants you to say, is that right?
>
> A: Yes. (RP 266-267)
>
> Q: Did you feel pressure due to your circumstances to testify in a way that you thought the State would like you to testify?
>
> A: Yes." (RP 269)

Prosecuting Attorney Alleges Misconduct on Part of Defense Counsel by Alleging that Police Reports Read by Tracy Vasquez were Improperly Shown to Him by Defense Counsel:

"Q: Look at the second page of those documents, please read the line that talks about I have looked at the police reports.

A: I in way implied to the police officer that I was –

Q: Read it to yourself, Mr. Vasquez. Do you see where it says that you read the police reports?

A: Afterwards yes.

Q: Where did you get the police reports?

A: Well I would have probably said Jeremy but it was mistaken on my – a mistake by me. It probably was from Brandy who brought over the Subpoena – or the affidavit for me to fill out.

Q: Well see here's the thing, the only people that have access to the police reports are counsel, attorneys –

Mr. Silverthorne: Objection. Relevance.

Mr. Underwood: Also he's testifying again. We need to address this outside the presence of the jury, Your Honor.

Mr. Greer: It's a question, Judge.

Mr. Silverthorne: It's not a question, it's an implication and it's offensive.

Mr. Underwood: Yeah. Complete –

Court: Well the objection is sustained. (RP 272-273)

Testimony re Jeremy Bono in a Drug Environment:

Tracy Vasquez testified that he met Jeremy Bono in a drug environment. Mr. Bono's attorney made a motion for a mistrial and this was denied by the Court, even though the Court had prohibited such testimony pursuant to a Motion in Limine. RP 248

The Prosecuting Attorney's questions relate Jeremy Bono to drugs.

"Q: What I mean is not just what are his characteristics, I mean what level of friendship did you obtain with him?

A: Unfortunately it was a drug association is how I met Mr. Bono." (RP 166)

The Prosecutor's conflicting statements about Jeremy Bono, even though the Prosecutor told the jury, in closing argument, that Jeremy Bono did not assault Garret Wilson (RP 589), that was not his statement to the jury in his opening remarks. He, there, advised the jury:

"After they stopped in these woods where nobody else was around to witness what was happening, they made him get out of the truck, the beating continued, Jeremy stood by and watched. Apparently he was the motivation but he was the strong arm and stood by and watched and the beating continued." (RP 146)

Further in his opening statement, the Prosecuting Attorney advised the jury that the State had actually listened to conversations between Metcalf and Vasquez and Wilson.

"The Defendant, Mr. Metcalf, after this case was filed, made hundreds of calls to Tracy Vasquez and set up what's called a three-way conversation so that he could talk to also Mr. Wilson and during these conversations, among other things, he said I will offer you $10,000.00 to not appear, to change your testimony, to make this go away. $6,000.00 cash and $4,000.00 in other property that I can give you, and Mr. Vasquez was also offered money and the State discovered that, actually listened to the conversations, found the information. And Mr. Vasquez will come and talk to you about those issues, about the bribes that were offered, and so will Mr. Wilson." (RP 148-149)

By joining Jeremy Bono's trial with that of Jared Metcalf, statements like these, which were not the only ones of that nature, materially reduced his chances of a fair trial. These statements would clearly point to the guilt of Jared Metcalf. And, by joining Jeremy Bono's trial with that of Jared Metcalf, they would clearly have an adverse impact on Jeremy Bono's trial. CrR 4.4(c) provides:

"Severance of Defendants

(1) A Defendant's motion for severance on the ground that an out-of-Court statement of a co-Defendant referring to him is inadmissible against him shall be granted unless:
(i) The Prosecuting Attorney elects not to offer the statement in the case in Chief; or
(ii) Deletion of all references to the moving Defendant will eliminate any prejudice to him from the admission of the statement."

While these statements did not come, directly, from the mouth of Jared Metcalf, they were, for all practical purposes within the meaning and intent of CrR 4.4.

Prosecuting Attorney Brings up Fact that Tracy Vasquez put Money "On the Books" for Jared Metcalf:

The clear implication of putting money "on the books" is that Jared Metcalf is in jail.

"Q: (by Mr. Greer) Now a couple other things. You not only incurred the phone bill in all the conversations you had with Mr. Metcalf but you also put money on his books, correct?

Mr. Silverthorne: Objection, exceeds the scope of cross.

Mr. Greer: Your Honor, it's on the issue of bias.

The Court: Objection overruled.

A: Yes.

Q: (by Mr. Greer) How much money did you put on the Defendant Mr. Metcalf's books over the course of time?

A: About 70 bucks, I think." (RP 262-263)

The clear implication, if one of these Defendants is in jail, is that the other is probably also in jail too.

Prosecuting Attorney Interviewed Defense Counsel's Assistant Without Presence of Defense Counsel:

"The Court: Do you have something, Mr. Underwood?

Mr. Underwood: There is – I do, Your Honor. Yesterday during Mr. Vasquez's testimony he mentioned that he received a

> Declaration from a woman named Brandy. Coincidentally my assistant's name is also Brandy. Mr. Greer insinuated and then in the hallway directly asked about whether or not it was my assistant. I said no and I said that he should not go and speak to my assistant about an ongoing case without going through me first. Told him that very specifically. He went down and talked to her anyway." (RP 306)

The Prosecuting Attorney insinuated into the record that the Defendants were going to commit "sexual acts" against Garret Wilson in both his direct examination of Vasquez and in his final argument:

> "Q: Did the person who was beating ever say anything?
>
> A: Yeah, just a bunch of obscenities.
>
> Q: What kind of obscenities?
>
> A: I don't wish to repeat them.
>
> Q: Well can you give the jury an understanding of –
>
> A: Verbal language, how about that?
>
> Q: Verbal?
>
> A: Verbally.
>
> Q: I'm sorry, I didn't understand.
>
> A: I forgot the word. Very rude language. Put it in layman's terms obscenities, cuss words.
>
> Q: Were they of a sexual nature?
>
> A: Possibly.
>
> Q: Did they include descriptions of what might happen to you?
>
> Mr. Silverthorne: Objection, leading.
>
> The Court: Objection overruled.
>
> A: Possibly. Don't really care, don't really know." (RP 331)

And in his final argument, the Prosecuting Attorney told the jury:

> "These two individuals, acting as thugs, decided to take this person up to the woods and on route during the process just beat him mercilessly, humiliate him in the truck, telling him that they were going to perform – or somebody was going to perform sexual acts on him, another male, and then once out of the truck basically an attempt to follow through with the threats." (RP 536)

There was absolutely no evidence of any male performing sex acts on the complaining witness and, in any event, there was no criminal charge relating to such activity.

The Prosecutor continued with such reference in his closing statement and further advised the jury:

> "Mr. Metcalf's intent was to cause great bodily harm to Mr. Wilson and probably other crimes, other acts such as rape. But as Mr. Wilson at one point said, he pooped on himself – he didn't use that word but I'm going to use it – in order to dissuade these two individuals from further humiliating him.
>
> Mr. Silverthorne: Objection, assuming facts not in evidence.
>
> The Court: This is closing argument. Objections overruled." (RP 546-547)

And the Prosecutor continues with this line of argument:

> "And despite Mr. Wilson's desire that they not be prosecuted, either because, as I said, he accepts the apology or the financial gain that he could get from this, or he doesn't want to come before you and talk about the fact that he potentially was raped, and had to poop all over himself to prevent –
>
> Mr. Underwood: Objection, there's no evidence of that.
>
> The Court: Jury gets to decide the facts. That's my ruling." (RP 591)

And, the Prosecutor continues for one addition comment on an issue that is not part of the Information and that is only meant to inflame the jury:

> "Mr. Greer: The last thing factually I think that's important and understanding and the State's position in this case that it was just brutal, senseless degradation and humiliation and it could have been worse but for frankly this defecation itself." (RP 598)

And again, even though Metcalf was not charged with any of these "sexual references", the overflow from these statements by the Prosecuting Attorney had to, again, reduce Jeremy Bono's chance of having a fair trial

The Washington Courts have commented on several of the practices set forth above.

In State v. Negrete, 72 Wn. App. 62, 863 P. 2d 137 (1993), the Prosecuting Attorney's remarks were held to be improper and prejudicial in stating that defense counsel "is being paid to twist the words of witnesses".

In State v. Rose, 62 Wn. 2d 309, 382 P. 2d 513, the Court held a Prosecuting Attorney's reference in closing argument to the Defendant as a "drunken homosexual" to be prejudicial and reversed the judgment and sentence. The Court said:

> "In our opinion, the argument of Appellant's counsel did not invite the use of the epithet 'drunken homosexual' by the Deputy Prosecutor. We hold that Appellant was deprived of a fair trial when the Deputy Prosecutor was permitted to indulge in such invective in addressing the jury."

Remarks by the Prosecuting Attorney are so objectionable as to cause reversal if they call to the jury's attention matters which it would not be justified in considering in determining its verdict and if, under the circumstances of the case, the jury was probably influenced by the remarks. State v. Adams, 76 Wn. 2d 650.

It has long been a precept of our legal system that Prosecuting Attorneys are quasi judicial officers with a duty to see that accused Defendants are given a fair trial. This was the only issue before the Court in State v. Montgomery, 56 Wash. 443 (1908), where the Defendant was tried for rape, where under factual circumstances somewhat similar to instant litigation the Prosecuting

Attorney brought forth from a witness that she had stated to the contrary of her testimony on several occasions and interrogated the witness at some length on the statements made contrary to her courtroom testimony.

The conduct of the Prosecuting Attorney was the only issue before the Court on the appeal. The Court recounted the relevant facts as follows:

> "The Prosecuting witness, a girl of the age of 15 years, was taken into custody about 3 months before the trial, and was confined in the juvenile detention room from the time of her arrest until after the trial. She was called as a witness for the State at the opening of the trial and testified that the Appellant never had sexual intercourse with her at any time or place. The Prosecuting Attorney thereupon stated to the Court, in the presence of the jury, that the witness had stated the contrary to him many, many times; that the witness had been tampered with and bought, etc. He was then permitted to ask the witness leading questions. In answer to such questions the witness freely admitted that she had told the Prosecuting Attorney that the Appellant had sexual intercourse with her on 3 different occasions, but insisted that she was frightened into making such statements. The Prosecuting Attorney was then permitted, over the objection and protest of the Appellant, to interrogate the witness at length, relative to statements she had made wherein she admitted that the Appellant had sexual intercourse with her at different times and places, with all the details and attendant circumstances. The witness admitting the making of all such statements, but insisted that they were absolutely false. She was thereupon withdrawn from the stand, to be recalled some hours later... Before leaving her, the Prosecuting Attorney told her that he could send her to the penitentiary for perjury, and after he left, the matron told her that she would find the Prosecuting Attorney a very good friend but a very powerful enemy... The Respondent contends that the Prosecuting Attorney and the matron only insisted that the witness should speak the truth, but the record shows only too clearly that the witness was given plainly to understand that her testimony given in the morning was not true, and that she should adhere to and reaffirm the statements made to the officers before the trial. The record clearly shows, also, that the witness was put under duress, and that her testimony was not voluntarily given when she took the stand the second time and testified against the Appellant."

In reversing the Defendant's conviction, the Court said:

> "It is the duty of the Prosecuting Attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of public justice.
>
> The conduct of the Prosecuting Attorney on the trial of this case did not measure up to these requirements... After the Prosecuting witness had admitted that she had made contradictory statements out of Court, her further examination as to the details of these statements, to the effect that the Appellant had sexual intercourse with her at different times and places, with all the attendant circumstances, could have no other object than to bring these extra judicial statements before the jury, to the manifest prejudice of the accused, and such a result must have been intended."

The Court then concluded its opinion with the following:

> "It is not our purpose to condemn the zeal manifested by the Prosecuting Attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, course and brutal in human life. But the safeguards which the wisdom of ages had thrown around persons accused of crime cannot be disregarded and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims. Believing that the Appellant was not accorded a fair and impartial trial in the Court below, the judgment is reversed and a new trial ordered."

In State v. Gibson, 75 Wn. 2d 175, 449 P. 2d 692, the Court commented on the decision in State v. Montgomery and commended it to all Prosecuting Attorneys. The Court said:

> "The closing paragraph in State v. Montgomery, 56 Wash. 443, 105 Pac. 1035, could well be on the desk of every Prosecutor as a constant reminder of the high duties of his office."

The Court then went on to say:

> "It must be remembered that it is the duty of a Prosecutor, as a quasi-judicial officer, to see that one accused of a crime is given a fair trial, and it is his duty to refrain from statements, not supported by the evidence, which degrade a Defendant or tend to inflame or prejudice a jury against him."

This Prosecutor should have read Montgomery: after casting Jeremy Bono as a drug user, alleging that he or Metcalf, or both, would be performing homosexual acts on Wilson, and then calling him a "Thug", he had degraded him to the bottom of the pile. In point of fact, at sentencing, it was shown that this father of 6 children, valedictorian of his high school class, and had one conviction for Attempted Manufacture of a Controlled Substance.

And, to top off his prejudicial statements, the Prosecuting Attorney also advises the jury that they can downgrade their responsibility regarding the truth.

> "Well there's a little twist now that the case is over and the Courts instructed you. You do not have to decide the truth of everything that happened. That is not your job. Maybe some jurors feel like they have to decide beyond a reasonable doubt what really happened in the case, and that is not the law." (RP 537-538)

EIGHTH GROUND:

Challenge to the Sufficiency of the Evidence:

Can anyone find that Jeremy Bono did anything other than drive Jared Metcalf to the home of Tracy Vasquez (there was no showing that either he or Metcalf knew that Garret Wilson would be there) and that upon entering the home and determining that Garret Wilson was there, Metcalf asked Garret Wilson to come with them for a ride to which Wilson "willingly" agreed. The three then entered Jeremy Bono's truck and at this point there is still no evidence to show that any crime was in the contemplation of either Jeremy Bono or Jared Metcalf as it was some two blocks from the residence before Jared Metcalf began hitting Garret Wilson. The two of them could very easily have gotten into an argument which precipitated Metcalf's assault. From that point, all we know is that Jeremy Bono drove the truck towards Wilkeson and South Prairie, ultimately stopping on a logging road at a time when fighting had stopped. RP 334

Jeremy Bono may very well have decided that the three of them needed some fresh air etc. However, once the three of them exited the truck, Wilson and Metcalf again started fighting and both of them went to the ground. Again, there was absolutely no participation by Jeremy Bono. Whereas there is some conflict as to whether Wilson took off his clothing because he wanted to or because Metcalf instructed him to do this, again, there is absolutely nothing showing any involvement of Jeremy Bono. Wilson then runs into the woods. As he is running, he is hit with two rocks. He said that neither one of them hurt him. And, there is no evidence to show if these two rocks hit him simultaneously or one after the other. If simultaneously, that would be an implication of two persons throwing different rocks; however, if one after the other, then they could very well have been thrown by the same person. And we know that Garret Wilson had sustained serious injuries in a fall from a tree and, just prior to leaving with Metcalf and Jeremy

Bono, received a phone call from his doctor. RP 239 We know that someone took his wallet and his shoes. However, again, there is no evidence that Jeremy Bono did this. Since Wilson did not announce how long he intended to be in the woods, the mere act of Jeremy Bono driving away, with Metcalf in the truck, again would not constitute any criminal liability.

To find Jeremy Bono guilty under this set of facts clearly contravenes the En Banc decision of the Washington Supreme Court In re: The Welfare of Ronald Wilson, 91 Wn. 2d 487, 588 P. 2d 1161 (1979). In Wilson, teenagers, including Wilson, had stretched a rope across a road and would bring it taut on the approach of vehicles. The rope had been stolen from a building. A witness testified that Wilson was standing where the rope was being pulled but she could not see who was actually pulling the rope.

In dismissing the case against Wilson as an accomplice, the Supreme Court was critical of the following language from the Court of Appeals:

> "It is not a crime to be indifferent to criminal activity and although it would have been praiseworthy for Appellant to make an effort to prevent these delinquent acts the law does not require him to do this. However, once he has knowledge of the theft and the stretching of the rope across the road, his continued presence at the scene of the ongoing crime can be reasonably inferred to 'encourage' the crime."

The Supreme Court went on to state that this language establishes "an overly broad rule" and went on to say:

> "Under the statutory language of RCW 9A.08.020, a person is not an accomplice unless he or she knowingly 'solicits, commands, encourages or requests' the commission of a crime, or aids in the planning or commission thereof. Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting. Presence at the scene of an ongoing crime may be sufficient if a person is 'ready to assist'...

> One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed. Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime...
>
> The Juvenile Court held and the Court of Appeals confirmed that in the context of the juvenile activity described above, Wilson's knowing presence was a sufficient act to permit the Court to find him to be an accomplice to the crime of reckless endangerment. This cannot be. Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of 'encouragement' in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting. We hold that something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding Wilson to be an accomplice in this instance."

A review of the evidence in this case reflects that the Prosecuting Attorney advised the jury, in closing argument, as follows:

> "It's a case of Jeremy, who did not commit any physical assault himself against this person, ..." (RP 589)

Cross examination of Garret Wilson:

> "Q: Have you previously been convicted of a Theft in the Third Degree?
>
> A: Yeah, a couple of times.
>
> Q: Couple of times, only two?
>
> A: About four.
>
> Q: Four times? Attempted forgery?
>
> A: Yeah.
>
> Q: And taking a motor vehicle, attempted?

A: Yes. You forgot my felony theft. That's there too. (RP 379)

Q: I'm handing you what's been marked as Defendant's Exhibit 6.

Q: Is that your signature on the last page?

A: Yes, it is.

Q: Alright. Is that Declaration true?

A: I believe so.

Q: Alright. Thank you. Now, you did not indicate anywhere in this Declaration that you were hit with a rock, right?

A: I read through it, glanced through it, yes, that's why the corrections were made.

Q: That's why what?

A: Why the corrections were made to it.

Q: Alright. So you read through it and you made corrections?

A: Yes.

Q: Did you mention anything about a rock?

A: Don't recall.

Q: Alright. Take a look at this. Now read through it.

A: I read through it earlier.

Q: Did you mention anything about a rock in this Declaration?

A: No. (RP 380-381)

Q: Regarding your statement to Detective Heishman, is that right?

A: That statement was a lot of lies.

Q: And what – you said what? Never mind. You indicated that she said to you that you ought to add things to your statement so that you could get a lot of money, right?

A: That's what she said. She didn't use exactly those words but that's what she was implying.

Q: Do you remember what the words that she used were?

A: No, I do not.

Q: And that's at least in part because you were stoned and on Percocet?

A: Yes. (RP 390-391)

Examination of Tracy Vasquez

Q: So then I guess you called Mr. Greer, according to Mr. Greer, and thanked him for being out of jail, is that right?

A: Yes.

Q: He put you in jail and sprung you from jail?

A: Yes.

Q: Okay. Is that affecting your testimony here today?

A: Today?

Q: Or Yesterday?

A: Well he keeps on using the word – what's the word – perjury, I feel like he's going to put me back in jail.

Q: So you feel threatened to say what he wants you to say, is that right?

A: Yes. (RP 266-267)

Q: Well let me just sidetrack for a second. You were high that day, how much had you used?

A: A daily usage for me is probably like between a gram to a tenner.

Q: Pretty high?

A: Yeah.

Q: Is it common to hallucinate when you were on meth?

A: I would say I don't hallucinate, but then again it's possible that...

....

Q: Now, there's all kinds of – there's a big sphere, pendulum, so to speak, of different types of hallucinations that you could have, right?

A: Right.

Q: Now you, as being high, can you distinguish what kind of hallucination is what or what is reality?

A: No, I wouldn't be able to because I'm high.

Q: Is it realistically possible that you were in that kind of a state on?

A: Yes, it is possible.

Q: On October 12?

A: As much drugs as I've done, it is a good possibility." (RP 237-238)

Similarly, in another En Banc decision, the Supreme Court in State v. Gladstone, 78 Wn. 2d 306, 474 P. 2d 274, explored the liability of an accomplice.

> "If all reasonable inferences favorable to the State are accorded the evidence, it does not, in our opinion, establish the commission of the crime charged. That vital element, a nexus, between the accused and the party whom he is charged with aiding and abetting in the commission of a crime – is missing. The record contains no evidence whatever that Gladstone had any communication by word, gesture or sign, before or after he drew the map, from which it could be inferred that he counseled, encouraged, hired, commanded, induced or procured Kent to sell marijuana to Douglas Thompson as charged, or took any steps to further the commission of the crime charged...
>
> ... One may become a principal through aiding and abetting another in the commission of a crime without participating in a conspiracy. But to be a principal, one must consciously share in a criminal act and participate in its accomplishment.
>
> Thus, even without prior agreement, arrangement or understanding, a bystander to a robbery could be guilty of aiding and abetting its commission if he came to the aid of a robber and knowingly assisted him in perpetrating the crime. But regardless modus operandi and with or without a conspiracy or agreement to commit the crime and whether present or away from the scene of it, there is no aiding and abetting unless one 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'
>
> ... Learned Hand J., we think, hit the nail squarely when, in United States v. Peoni, 100 Fed. 2d 401, he wrote that, in order to aid and abet another to commit a crime, it is necessary that a Defendant
>
> 'In some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used – even the most colorless, 'abet' – carry an implication of purposive attitude towards it.'
>
> Similarly, the same principle was declared in Johnson v. United States, 195 Fed. 2d 673:

'Generally speaking to find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. As the term 'aiding and abetting' implies, it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed.

....

After tracing the common-law distinction between a principal in the second degree and an accessory before the fact and pointing out that an aider and abetter must at least procure, counsel or command another to commit the felony actually committed, the Court said at 830:

'It is not necessary that there should be any direct communication between an accessory before the fact and the principal felon; it is enough if the accessory direct an intermediate agent to procure another to commit the felony, without naming or knowing of the person to be procured. A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must insight, or procure or encourage the criminal act, or assist or enable it to be done, or engage or counsel or command the principal to do it.'

....

This Court has recognized the necessity of proof of a nexus between aider and abetter and other principals to sustain a conviction. In State v. Hinkley, 52 Wn. 2d 415, 325 P. 2d 889, amplifying the term abet, we said:

'Although the word 'aid' does not imply guilty knowledge or felonious intent, the word 'abet' includes knowledge of the wrongful purpose of the perpetrator, as well as counsel and encouragement in the crime.'"

This same principle was set forth in a case with some striking similarities to instant case, State v. Luna, 71 Wn. App. 755, 862 P. 2d 620 (1993), where Luna was one of a group of juveniles engaged in vehicle prowling. They initially were in a Camaro. At one point, Lauriton stopped the Camaro and walked away. The others, including Luna, got out of the Camaro but

stood near the car. Suddenly a red pick-up truck sped pass with Lauriton at the wheel. The others jumped back into the Camaro with Luna driving and followed the truck on the freeway, where it eventually pulled over onto the shoulder. Lauriton got out of the truck and back behind the wheel of the Camaro. Brown then took Lauriton's place in the truck and Luna sat in the backseat of the Camaro. Luna was convicted as an accomplice to the crime of taking a motor vehicle without permission.

There was no dispute that the pick-up, owned by one Thomas Vinion, was stolen by Lauriton, nor that Brown drove the truck knowing it to be stolen. The defense contended that Luna did not know of Lauriton's intentions before he took the truck, nor that he knew of Brown's intention to drive it when they stopped on the freeway. Luna admitted that he knew the truck was stolen when he followed it in the Camaro and that he drove the Camaro in a race with the truck during which the truck was damaged. In reversing the decision and dismissing the case as to Luna's guilt as an accomplice, the Court said:

> "A Defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to make succeed. Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the Defendant was ready to assist in the crime.
>
> The State's evidence is insufficient to prove that Mr. Luna possessed the mental state required of an accomplice. While Mr. Luna knew, after the fact, that Mr. Lauriton took the truck without permission, there is no evidence that he knew of, or even suspected, Mr. Lauriton's intent before the theft occurred. Neither can it rationally be concluded under the evidence that Mr. Luna, by following the stolen truck in the Camaro, promoted or facilitated the theft or aided Mr. Lauriton in stealing the truck. Mr. Luna did not, by driving away in the Camaro, seek to make the theft succeed, since it had already occurred and he was unaware of Mr. Lauriton's plans after that point."

We again see the infirmity and the damage done to Mr. Bono's right to a fair trial by the Prosecutor's remarks when one might be inclined to hold him to accomplice liability because of his proximity to the criminal activity, mere feet away, but as was Wilson, with the others at the end of the rope, this would be an error. Further, since he drove a vehicle in which criminal activity occurred, we might again be willing to place accomplice liability on him, but again, as in Luna, this would be improper.

Respectfully Submitted this 22nd day of March, 2011.

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STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

After being first duly sworn on oath I depose and say that I am the attorney for the Petitioner, that I have read the Petition, know its contents and I believe the Petition is true.

Richard F. DeJean

SUBSCRIBED AND SWORN to before me this 22 day of March, 2011.

BRENDA M. HIGH NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 7-19-14

Notary Public in and for the State of Washington residing at: PUYALLUP
My Commission expires: 07/19/14

I declare that I am the Petitioner and I have examined the Petition and to the best of my knowledge and belief it is true and correct.

DATED this _____ day of _____, 2011.

Jeremy Bono, Petitioner